IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

NIA ELECTRIC POWER COMPANY,

Petitioner,

vs.

POWER COMMISSION,

Respondent.

---

er's Reply to Respondent's "Memorandum in ponse to Pages 15-17 of Petitioner's Reply ef."

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TABLE OF AUTHORITIES CITED

No. 12987

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ndent having filed a Memorandum entitled as urporting to discuss pages 15-17 of Petitioner's ief, the Court, in response to Petitioner's state- at Respondent had misrepresented Petitioner's lowed Petitioner ten days to file this reply.

rgument at pages 15-17 of Petitioner's Reply headed

The 'Indistinguishable' 25%."

The matter at pages 15-17 of Petitioner's Re
is a subsidiary argument or a "but if" argume
do contend on the main case that the energy del
Navy is not in interstate commerce and is not f
within the meaning of the statute, but at this p
place we dropped down to a subsidiary positio
in effect: But if the energy is in interstate c
and, if some part (say 25%) is resold, FPC h
diction over only the part resold.

The actual statement (Rep. Br. p. 15) was:

> *"It must be admitted that the remaining*
> *least, is not subject to FPC jurisdiction."*

Respondent's Memorandum does not accord
statement, but says (p. 1):

> "Petitioner argues that *federal regulatio*
> *yield to State regulation of its sale to Navy*
> *only 25 per cent of the energy sold to Navy*
> (emphasis added),

and that (p. 2):

> "* * * because the admittedly jurisdict
> ergy flow is mixed with a larger flow o
> which, standing alone, would not be subject
> mission jurisdiction, the *entire sale* is ou
> Commission's jurisdiction." (Emphasis ad

Petitioner made no such statement; its Reply
succinct and clear to the effect that the 75%

emorandum seeks to make Petitioner say that
t would be subject to FPC jurisdiction.

he Respondent, not the Petitioner, which uses
ingling" argument. Petitioner does not admit
e is any "comingling" which affects this case at
akes any of the energy "indistinguishable." This
resort of Respondent. Its claim is that FPC has
on over energy not sold for resale, because and
use of "inextricable comingling."

ecord disputes the "inextricable comingling"

ident's own Exhibit 32 computes the percentages
s sales of total purchased and generated energy
s:

'1943 (last half)	28.6%
1944	19.7%
1945	15.5%
1946	15.8%
1947	20.3%
1948	22.5%"

g 6 [R. p. 105] recites in part:
For the period from 1943 to 1948, inclusive, the
entage of energy resold by the Navy (to the
purchased from California Electric and gen-
ed by the Navy) ranged from 15.4% to 28.6%,
average being 18.7%."

both these quantities are given in Exhibit 32,
centages of energy purchased from Petitioner
"resold" can equally well be computed.

Thus, in 1948, there was	Purchased	5,355,1
	Generated	353,7
	Total	5,708,8
	"Resold"	1,281,6
	% "Resold"	

The 5,355,155 kwh purchased is 93.8% of
of 5,708,850 kwh generated and purchased so
22.5% of the total becomes 21.1% of the en
chased, which was "resold."

Respondent's theory of "inextricable mixture"
on the idea that particles of energy or kilow
cannot be distinguished or identified, so that,
tities of energy from different sources get into
line, they can never be separated. The practice
ing two supplies of energy into a line and mete
out of the line is too well known to permit
quibbling.

Such metering and separation was contem
Idaho Power Co. v. FPC, 189 F. 2d 665, wh
itself, issued a license for a transmission line
the Company to receive and transmit over the
with the Company's own energy, energy suppli
government. The same thing was actually bein
City of Los Angeles v. The Nevada-Californi
Corp., 2 FPC 104, 32 P. U. R. N. S. 193,
FPC suggested no "inextricable comingling"

ıtities of power from the Bureau of Reclama-
asta Dam and returning, not the same kilowatt
equivalent amounts to the Bureau at numerous
the Central Valley. To adopt Respondent's
uld push back electrical practice in this country
30 years.

es cited in Respondent's Memorandum present
t situation from the case at bar. In each of
s, the utility company had, *on its system, mixed
antly varying supplies of intrastate and inter-
gy which were delivered to various customers,
s places, at various times, and in varying
No effort was made by the utility to ascertain
of each kind was delivered, from time to time,
eral customers.*

tant case is just the reverse. Petitioner's supply
is all purely California intrastate energy. It
vered for the operation of the Naval Ammuni-
t. It retains those characters until it reaches
tion on the Depot Reservation, where (we are
for argument) an accurately metered portion
' by the Navy.

se is therefore precisely like *Colorado Interstate*
185 F. 2d 357 (C. A. 3). There FPC ordered
Interstate to file a schedule covering *all* of its
to the customers. Here FPC has ordered the
to file a schedule covering *all* its deliveries to
There the Third Circuit held that FPC could

"inextricable intermixture" of particles of ga
the Court can have none with electric energy.

Respondent, at page 3 of its Memorandum
distinguish *Colorado Interstate Gas Co.* by q
language in which the Third Circuit refused to
whether the boiler gas was *in fact* sold for co
or for resale. But, in the present case, we are
for the sake of argument, that some of the elect
is resold by the Navy. Therefore, *Colorado*
Gas Co. is directly in point on the principle that
would be obligated by law to file with FPC only
applicable to resale energy.

The language quoted in the Memorandum f
rado Interstate Gas Co. is, however, authorit
proposition that this Court need not now dete
question of resale or no resale. That depends
past events and can be determined only for
This Court has no way of finding whether
be resale or no resale in the future. It has n
knowing whether or not the Navy will continue
energy to its employees or to make a charge th
even that it will have any tenants to supply.

On the other hand, as suggested by a question
Bench during oral argument, the Navy might
general public service in Mineral County; it
tend its lines into the town of Hawthorne
within the Naval Reservation) in competition
eral County Power System, in which event, it c
ably drive the latter out of business by rea

estion of whether or not Petitioner must file a
pplicable to resale energy is a matter of law;
on of whether in the future there is any resale
red by the schedule is a matter of indeterminable
nts. If the schedule were filed covering energy
esale it would cover any energy so resold; if
e resold, the schedule would have nothing on
operate.

to avoid any possible misunderstanding, we
epeat that the Point in Petitioner's Reply Brief
o in Respondent's said Memorandum and also
a subsidiary point, contingent upon the rejection
ner's main point, to which it still adheres, that
no jurisdiction and can be given no jurisdiction
y some further Act of Congress) over Naval
so as to supersede the power of the Navy
nt to negotiate its own contracts for electric
We know of no authority of the Navy Depart-
or without the concurrence of the Attorney
accomplish that transfer of jurisdiction.

Respectfully submitted,

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